U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 June 2004

BALCA Case No.: 2003-INA-156
ETA Case No.: P2000-CA-09509448/GH

In the Matter of:

TRED MANOR,
Employer,

on behalf of

PEDRO MIRANDA PARRA,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Maria Marrero, Esquire
Huntington Park, California
For Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Tred Manor ("the Employer") filed an application for labor certification[1] on behalf of Pedro Miranda Parra ("the Alien") on February 12, 2000. (AF 14).[2] The Employer seeks to employ the Alien as a machinist, wood (DOT Code: 669380014).[3] This decision is based on the record upon which the Certifying Officer

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

("CO") denied certification and the Employer's request for review, as contained in the Appeal File and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as sawing and cutting wood, setting up boring machines for drilling holes into wood, and setting up routers for cutting details into wood. The Employer required no advanced education or specialized training. (AF 14-16).

In the Notice of Findings ("NOF"), issued May 30, 2001, the CO found that there was insufficient evidence to document that the Employer made a good faith effort to recruit qualified U.S. workers to fill the job opening. (AF 10-12). The CO stated that although the Employer claimed to have contacted the two applicants by certified mail, the Employer's recruitment report did not specify the mailing dates of these certified letters. (AF 11). Additionally, the CO pointed out that the Employer did not submit copies of postmarked receipts for certified mailing; rather, the Employer included a copy of the back of PS Form 3800, which provides instructions and information on certified mailing procedures, but provides no proof of the date of mailing or if the letter was ever mailed. The CO also noted the letter was undated, unsigned and not on the Employer's letterhead. The letter did not include the Employer's telephone number and provided no way for the applicants to call the Employer to reschedule the interview, if necessary. (AF 11).

The CO instructed the Employer to submit rebuttal giving specific details of the Employer's efforts to contact and interview all potentially qualified applicants. The CO stated that the Employer should provide any documentation substantiating its recruitment efforts, such as postmarked receipts for certified mailing, signed return receipts from applicants showing date(s) of delivery, telephone records, contemporaneous notes, or other evidence, as part of its rebuttal. (AF 11).

[3] In this decision, DOT is an abbreviation for the Dictionary of Occupational Titles.

In the rebuttal, dated November 25, 2002, the Employer reiterated that neither applicant appeared for interviews scheduled by the Employer. (AF 7-9). The Employer further stated that the postal office return receipts were not included because they were not returned. (AF 7).

The CO issued a Final Determination ("FD") on September 18, 2001, denying certification. (AF 4-6). The CO noted that the Employer did not provide the dates the certified letters were mailed and did not provide copies of the return receipts. The CO found that the Employer's statement that the U.S. Postal Service did not provide the return receipts was not credible. The CO also noted that the Employer failed to address the deficiencies in its letter to the applicants, stating that the Employer's letter to the applicants scheduling interviews was not on business letterhead, was undated, and did not include the Employer's telephone number. The CO concluded, by the Employer's own admission, that the two U.S. applicants were qualified for the position. The CO found that the Employer failed to document that it made good faith efforts to recruit U.S. workers and failed to document that it lawfully rejected U.S. workers. (AF 5-6).

By letter dated January 30, 2003, the Employer requested review by this Board, reiterating the contention that he engaged in good faith recruitment. (AF 1-3). The Employer agreed that the two U.S. applicants were qualified for the position and argued that neither applicant appeared for the interview, despite the Employer's letter notifying them of the appointment. (AF 1). The case was docketed in this Office on May 13, 2003, and the Employer did not file an additional brief in support of its appeal.

DISCUSSION

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

It is the employer who bears the burden of proving that all regulatory requirements have been satisfied, and this burden of proof must be met before any application for labor certification can be granted. 20 C.F.R. § 656.2(b).

Twenty C.F.R. § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings of the NOF, and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO's finding which is not addressed in rebuttal is deemed admitted. *Belha Corp.,* 1988-INA-24 (May 5, 1989) (*en banc*). The employer must provide directly relevant and reasonably obtainable documentation that is requested by the CO. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, especially when the employer does not justify this failure. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988); *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991).

A recruitment report must describe the details of the employer's attempts to contact the applicants. An employer's recruitment report may be insufficient where it merely asserts that the applicant was unavailable without proving contact. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*) (report failed to indicate when or how many times the employer attempted to contact the applicant by telephone, whether the attempt was at work or home, what (if any) message was left, or whether alternative means of contact were attempted).

In this case, the Employer failed to provide the documentation required in the NOF which was directly relevant to the issue of whether the Employer used good faith efforts to contact and consider the two potentially qualified U.S. applicants. The Employer did not contradict the CO's finding that he failed to provide a phone number in the letters to the applicants setting a time for an interview, failed to document that the letters were sent certified mail and failed to document that the letters were even sent. Moreover, the Employer failed to explain his failure to provide any evidence that such

documentation was not reasonably obtainable. A bare assertion, without any supporting evidence, that the Employer contacted the applicants is insufficient to sustain the Employer's burden of proof. *See, e.g., Gencorp, supra.*

Thus, we find that the CO properly raised the issue of whether the Employer had put forth an adequate, good faith effort to recruit U.S. workers for the position being offered, that the Employer's rebuttal did not adequately rebut that issue, and that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.